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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1995

Francis L. Gill,

Petitioner,

vs.

Territory of Guam,

Respondent

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Respondent wishes to point out that the premise in the Question Presented by the Petitioner has no basis in the Record of this Case. There is no evidence in the Record that the land in question into which Petitioner attempted to expand his property was ever owned by any private interest. Appendix A at p. *8. Further, the Appellate Division determined that the Record showed that the Petitioner knew that the land into which he was expanding his land was government land. Appendix A at p. *8, ¶5.

OPINION BELOW

The July 18, 1995 Decision of the United States Court of Appeals for the Ninth Circuit, entitled *People of the Territory of Guam v. Francis L. Gill*, is reported at 61 F.3d 688.

While mentioned in the above opinion, the Respondents wish to point out that the Ninth Circuit Opinion was not directly reviewing the Judgment of Conviction of the trial court. Rather, the Ninth Circuit was reviewing the Opinion of Guam's intermediate appellate court, the Appellate Division of the District Court of Guam. That Opinion, *People of the Territory of Guam v. Francis L. Gill*, D.Guam Appellate Div., Cr. No. 92-00099A, April 15, 1994, is reported at 1994 WL 150934 (D.Guam). That Opinion is reproduced in this Brief at Appendix A.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is misleading in material parts. The Petitioner never presented the issue of the Treaty of Paris to the Trial Court. Therefore, this question was not addressed by that, or any later, court, and should not be a part of the "Case".

Petitioner further misstates the record where he states that the land in question was both unregistered *and untitled*. Nowhere does Guam law equate *registration* with *ownership*. 21 GCA § 29105.

Further, it is not correct to state that there was *no* evidence of title in the Government of Guam. See Appendix A at p, *8.

Judge Weeks, in answering the Petitioner's Motion to Acquit, did not hold that the Government had an interest "short of title", as stated by Petitioner. Rather, Judge Weeks, in explaining that Registration was not necessary to title stated, on p. 3 of Petitioner's Appendix "D":

> The Government of Guam need not have had a Certificate of Title in order to have an interest in the land. The evidence put forward by the People was sufficient for the jury to conclude that the Government did have a property right in the land. This interest *need not* be one of absolute title to sustain a conviction under the theft statutes. (Emphasis added)

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Territory of Guam ("Respondent") hereby responds to the Petition for Writ of Certiorari ("Petitioner"), filed by Petitioner Francis L. Gill. Respondent respectfully requests that this Court deny the Petition.

Review by this Court is unnecessary because (a) the Question Presented to this Court has not been presented, nor ruled upon, below, (b) the Petitioner fails to identify any of the reasons stated in the rules of this Court, why this case merits certiorari, (c) the Petitioner relies upon erroneous facts, and (d) even if the Petitioner's legal analysis were correct, it would not act to relieve him of criminal liability for his acts.

ARGUMENT

1. The Question Presented was never presented below.

The claim that the Treaty of Peace bars the Territory of Guam from exercising jurisdiction over the land in question was never raised below. This failure is reflected in the decisions of the Appellate Division of the District Court of Guam and the Ninth Circuit Court of Appeals, both of which have now been provided to the Court. See Appendix A, p. *1.

This Court has consistently indicated that it will decline to consider issues, in its review of state cases, where that issue was not "pressed or passed upon in the courts below". *Kentucky v. Stincer*, 482 U.S. 730, 747, n.22, 107 S.Ct. 2658, 2668, n.22, 96 L.Ed.2d 631, (1987) (quoting *McGoldrick v. Compagnie Generale Tranatlantique*, 309 U.S. 430, 434, 60 S.Ct. 670, 672, 84 L.Ed.2d

849 (1940). The *Stincer* decision indicates that even in federal cases the High Court will not review an issue that was not pressed below absent "exceptional circumstances". Id. at n.22. This failure in itself should lead the Court to reject the Petition.

2. Petitioner failed to provide any recognized reasons for the granting of his Petition.

The issue identified is narrow, if not unique. Petitioner urges this Court to consider whether the Treaty of Paris of 1898 (also known as the Treaty of Peace) prevents the Territory of Guam from exercising jurisdiction over Petitioner's attempted theft of real property. This issue does not rise from a claim that he was not guilty of attempting to steal property, only that Guam should be deemed lacking authority to enforce its criminal law as to the parcels in question.

Not surprisingly, the Petitioner has failed to identify a split in Circuit authority over this issue, which is stated as arising from Treaty provisions bearing on Guam. He has not claimed that the decision determines an important federal question in a manner at odds with the decision of a state supreme court, or vice versa, for that matter. Nor does he argue that the decision below represents a departure form the "accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." This would be a difficult point to claim because, as is discussed below, the issue he frames was not raised below in the course of the appeal and was, therefore, not considered by the Ninth Circuit Court of Appeals. Nowhere below was the 1898 Treaty with Spain ever addressed.

3. **The Petitioner relies on an erroneous statement of the facts to support his Petition.**

a. Erroneous statement of the Record

Evidence was presented at trial that the property in issue was transferred from the United States government to the Territory of Guam. What is missing form the record is any evidence to the contrary. The Petitioner adduced no evidence at trial that this property belonged to any private person or other entity than the Territory of Guam. Of this, the Appellate Division of the District Court of Guam stated:

> Appellant's argument fails for the primary reason that the government indeed presented evidence that the land in question was government land. The government elicited testimony from Frank Castro, Director of Land Management, that the land in question was government land. (Tr. III pp. 18-20). The Director of Land Management based his conclusion on the fact that the land in question in this case was transferred to the government of Guam by the United States. (Tr. III pp. 16-17) The government also presented testimony of Department of Land Management worker Jimmy Camacho that the land being claimed was government land. (Tr. IV p. 114). While the evidence that it was government land was not supported by the document creating title in the government of Guam, there was nonetheless adequate and compelling evidence that it certainly did not belong to appellant and that the land was government land. And, this evidence was never contradicted. Appendix A, p. *8.

There is nothing in the records showing any effect upon the properties in question by the Japanese occupation during World War II.

b. **This Petition presents erroneous statements about the state of Guam land law.**

Petitioner incorrectly states that the Land Registration Act was first enacted in 1953 "due to the unreliability of land titles on Guam." A comprehensive history of United States efforts to assure that private lands were protected (and taxed) is contained in the District Court of Guam, Appellate Division decision of *In re application of Anderson Iglesias, et al.*, 1 Guam Reports 129 (1963). Of the current Land Registration Law, that court stated, at p. 139:

> It should be further noted that the Guam Land Title Registration Act, lacking one of the essentials of a true Torrens system as noted above, is effect provides merely a system of quieting title which is essentially an equity matter and in which equitable matters must be considered.

Likewise, Petitioner is in error when he equates registration with title. The present Act provides, in part:

> **21 GCA §29105. Land Brought Under the Law by Filing Petition: Contents, etc.** All land may be brought under the operation of this Law by the owner or owners of any estate or interest therein, whether legal or equitable (other than an individual share or an easement) by filing with the clerk . . .

This section is permissive, allowing owners of land to register or not to register their land as they see fit. Nothing in this law

(Chapter 29) states that non-registration equates to non-title. It has long been held that government land cannot be acquired by a private interest by adverse possession. *Tenorio v. Government of Guam*, 527 F.2d 1095 (9th Cir. 1974); *In Re Application of Yamashita*, 59 F.3d 114 (9th Cir. 1995).

4. The Petitioner's legal analysis is without foundation.

An essential component of the Petitioner's challenge appears to focus on the statute which makes land in the Territory of Guam, having no other owner, the property of Guam. 21 GCA §1202. He appears to urge that the application of this provision usurps the interests of private property owners in a manner which is contrary to the Treaty of Paris. He apparently has not read the statute he harps upon. It is as clear as it is short. It applies when there is no known private owner. For the entire length of the United States occupation of Guam, no private person has been permitted to claim land for which there is no previous owner. See, *generally*, *In Re Application of Anderson Iglesias*, above.

It is fairly obvious that lands having a private owner are not included in its embrace. By its own terms the statute avoids encroaching on private property interests. The issue that the Petitioner seeks to raise is illusory.

5. Even if Petitioner's argument over the civil status had merit, it is irrelevant to his conviction.

As the Ninth Circuit noted in its decision, the offense of attempted theft of property merely requires proof beyond a reasonable doubt that the property being taken is the "property of another". Petitioner's argument that the land does not legitimately belong to the Territory of Guam does not change the fact that it did not belong to him.

This point aside, his argument would still be moot as to its effect on his conviction. It is well settled that a thief can steal from a thief. See, e.g., §390 of Wharton's Criminal Law (1980) (text accompanying note 81 and case authority cited in that note). Even had Guam unlawfully taken this property, this circumstance would not excuse Gill's criminality.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari.

Dated: March 27, 1996.

Respectfully submitted,

Charles H. Troutman III
Compiler of Laws
Territory of Guam

Attorney for Respondents

APPENDIX "A"

Copr. (C) West 1996 No claim to orig. U.S. govt. works
1994 WL 150934 (D.Guam)
(Cite as: 1994 WL 150934 (D.Guam))

PEOPLE OF the TERRITORY OF GUAM,
Plaintiff-Appellee,
v.
Francis L. GILL,
Defendant-Appellant.
Cr. No. 92-00099A.

District Court of Guam, Appellate Division.
Argued and Submitted Oct. 8, 1993.
Re-Submitted Dec. 14, 1993.
Decided April 15, 1994.

Appeal from the Superior Court of Guam, Superior Court Case No. CF-119-90; Janet Healy Weeks, Presiding.

Elizabeth Barrett-Anderson, Atty. Gen. of Guam by Andrew Artero-Boname, Asst. Atty. Gen., Prosecution Div., Agana, Guam, for plaintiff-appellee.

Howard Trapp, Howard Trapp Inc., Agana, Guam, for defendant-appellant.

Before: EDWARD RAFEEDIE [FN1], ALEX R. MUNSON [FN2] and JOHN S. UNPINGCO, District Judges.

OPINION

UNPINGCO, Judge:

*1 This is an appeal from Appellant's March 27, 1992 conviction for one count of Conspiracy to Commit Theft of Immovable Property, three counts of Attempted Theft of Immovable Property, and one count of Conspiracy to Tamper with Records. Appellant urges reversal on the basis of insufficiency of the evidence, and several other grounds.

First, Appellant argues that there was insufficient evidence adduced at trial to sustain his five convictions for Conspiracy to Commit Theft of Immovable Property, Attempted Theft of Immovable Property and Conspiracy to Tamper with Records. Second, Appellant argues that the evidence was insufficient to establish that the disputed land belonged to the Guam government. Third, Appellant raises a series of grounds for overturning the theft convictions, namely: (1) that Appellant never had a fiduciary relationship with the property, (2) that an attempt to commit an act which is not a crime cannot be the basis of a criminal conviction, and (3) that Appellant was not empowered to dispose of the land. Finally, Appellant argues that the tampering conviction cannot stand because the maps were not public records when created.

PROCEEDINGS BELOW

The defendant was indicted with co-defendants Thomas Anderson ("Anderson") and Joseph B. Cruz ("Cruz") by the territorial grand jury on September 12, 1990, which eventually led to a superseding indictment on September 4, 1991. Defendant Frances Gill ("Gill") was charged with Conspiracy to Commit Theft, Attempted Theft and Conspiracy to Tamper with Public Records. Co-defendant Cruz was indicted for those same crimes, as well as Tampering with Public Records and Official Misconduct. Defendant Anderson pled guilty and testified against defendants Gill and Cruz, who were tried together. Both defendants were found guilty of all counts on March 27, 1992.

FACTS

The convictions resulted from Appellant's participation in the creation and recordation of maps for four parcels of property on Guam. It was proved at trial that defendants re-drew maps of four parcels to encompass government land adjacent to Appellant's parcels. Appellant's lot located in Piti, consisting of 1.6 hectares on one map, [FN3] (or possibly three hectares according to another source), grew to 3.9 hectares on a later map. Appellant's Umatac lot grew from 3 hectares on one map to 10 hectares on a later map, and Agua & Gumoje (Merizo), once 32 and 33 hectares respectively on earlier maps, became

over 300 hectares on the new maps. The transactions went sequentially as follows:

Piti

Frances Gill, a practicing attorney on Guam, was interested in purchasing a parcel of property in Piti from an elderly person, Ms. Emilia Pangelinan. A purchase was arranged, and in December 1988 Ms. Pangelinan executed a Grant Deed to Guam Landvest, Ltd., Gill's corporation. (Exhibit 15). The Grant Deed's property description stated that "Lot No. 215 and place name of Atantano, Piti" was being conveyed. There was no indication of the size of the land being conveyed.

*2 Gill requested Anderson, a registered land surveyor on Guam, to come to his office to talk about surveying the lot in anticipation of a land registration proceeding. At their first meeting, Anderson showed Gill documents that his co-worker had discovered at Land Management which indicated that Lot 215 was 1.6 hectares, but Anderson also told Gill that according to the 1941 tax rolls, the place of "Atantano" showed to be 3 hectares. (Tr. VII p. 112). [FN4]

Anderson also showed Gill a map prepared by a Robert Beam, who did not testify at trial. The map was not introduced into evidence. (Tr. VII p. 112). He told Gill that according to that map, a large parcel of unsurveyed government land stood between Gill's Lot 215 and Marine Drive. Gill asked Anderson, "Can I claim it?" to which Anderson replied "I don't know." Gill then offered Anderson $20,000.00, four times his normal fee, and instructed Anderson to prepare the map claiming the unsurveyed government land. (Tr. VII p. 115-116).

Anderson instructed one of his workers to prepare the map to create a new lot, encompassing Atantano, and including the unnumbered unsurveyed government land. Anderson then received new Lot Number 285 for the lot upon verbal request to Land Management. (Tr. VII p. 119).

Gill instructed Anderson to consolidate Lot 215 and Lot 285 into new Lot 285, comprised of 3.9 hectares and to subdivide it. When the map was ready, Anderson went to Gill's office for signature on the "checkprint." [FN5] (Tr. VII p. 122). The checkprint was sent to Land Management and sent back with comments. None of the comments on

the checkprint noted any irregularity with respect to the unsurveyed government land encompassed by the map. Anderson's office made the necessary corrections and re-submitted the map, which was then approved. (Tr. VII p. 126). There is no direct testimony as to how the approval was obtained, though Jimmy Camacho, a draftsman in the Survey Division of Land Management, testified that he notified Roy Aguilar, the draftsman who prepared the map for Anderson, that it encroached on government land. (Tr. IV p. 114). Aguilar, in turn, testified that he reported this comment to Anderson, but that Mr. Anderson had instructed him to keep the map the way it was. (Tr. IV pp. 137-149).

Anderson went to Gill's office to show him the approved map. Gill is reported to have said "no shit--maps approved?" and then laughed. (Tr. VII p. 126). He then told Anderson that he had some other survey work for him to do.

Umatac

After the Piti project was completed, Anderson told Gill that some land was available near Cetti Bay, Umatac, but Anderson warned Gill that the title to the land was "no good." By "no good" he was referring to the fact that he and Mr. Jose Taimanglo Garcia had, in an elaborate plot, created the title to this lot themselves.

Testimony of Anderson and Garcia revealed a scheme whereby they created new title to unsurveyed government land. Garcia found the names of recently deceased people and forged their names to fictitious deeds to create lots. In actuality, the lots contained unsurveyed government land. Then Anderson went to his cousin, Joe Cruz, who worked at Land Management as the territory's Land Administrator [FN6], and asked for (1) a lot number for the lot, and (2) an "escaped assessment" [FN7] tax record for the lot from the Department of Revenue and Taxation.

*3 Joe Cruz in turn asked the Department of Revenue and Taxation for an escaped assessment on the lots. Testimony established that Vicente Cruz of the Real Property Tax branch of Revenue and Taxation, (no relation to Joe Cruz), was asked for the escaped assessment on the new lots. Vicente Cruz was uncertain as to the basis of the request, so he went to his supervisor, Ray Blas, to ask if he should comply with the request. (Tr. VI p. 78).

Ray Blas testified that because the request came from the Land Administrator of the Territory of Guam, there was no reason not to comply with the request. (Tr. VI p. 94-95). The tax records were created for the lots and Anderson then paid the taxes on the lot, and that created the chain of title.

At the same time as creating a tax record for the land, Cruz also obtained lot numbers for the land. He was given Lot Number 154A for the Umatac lot and Lot Numbers 521 and 522 for the Merizo lots. (Tr. VIII p 76-78). Anderson and Garcia intended to first register the land, and then sell it.

The registration was important, because testimony was that the Japanese developers who were investing in Guam land at that time were not comfortable buying land that was not registered under Guam's Land Registration Act, s 1157 et seq. of the Civil Code. [FN8] (Tr. VII p. 31). To obtain a decree of ownership at a land registration proceeding, one needed only to produce a map, supported by some evidence of title. If no one appeared to object, the decree issued by the Superior Court was deemed conclusive evidence of title.

When Anderson told Gill that title to the Umatac lot was "no good," Gill is reported to have responded "It's okay. I'm a lawyer." (Tr. VII p. 133). Gill was interested in buying the lot from Anderson and went to view the property at Cetti Bay. After he walked the property, he instructed Anderson to map the lot, but to include in the map of Lot 154A all the land "all the way to the existing paved road that leads down to the beach area." (Tr. VIII p. 20).

The maps for Lot 154A Umatac show the development of this transaction: Exhibit 3A shows Lot 154A containing approximately 3 hectares. That map shows the adjacent land as "government of Guam land, unsurveyed." The subsequent map for Lot 154A, shown in Exhibit 3B and drawn by Anderson at Gill's request just four months later, shows an area of 10.4 hectares. When Anderson presented these maps, a checkprint was not presented to Land Management. Nonetheless, the maps were approved.

Though normally a map cannot be approved without the approval of the Territorial Surveyor, there was testimony that during the months in which these events unfolded, the Director of Land Management had delegated to Joseph Cruz the authority to act as the

Director of Land Management. (Tr. III p. 76). Anderson testified that, for instance, the map for Lot 154A Umatac was approved without a checkprint because he had told a friend at Land Management, Bernie Ortega, that "Roy [Aguilar] would be giving him a map that he could sign for me."

*4 Jimmy Camacho, an employee of the Survey Division, also testified about documents that would normally have to clear his office which in fact did not cross his desk but nonetheless bore the initials "JC" on them. Camacho reviewed the "JC" that appeared on Exhibits 3B, (the lot showing 154A to be 10.4 hectares for the first time), 4A, 5A, 6A, 7A, 8, (all maps wherein Gill's Lot 154A was subdivided), 9A, 10A, (both maps of Lot 521 Merizo) and 2C (the checkprint for Lot 285 Piti). He testified that the "JC" appearing on all those exhibits was not his (Jimmy Camacho's) initials, but were of another "JC" at Land Management. (Tr. IV p. 118-123). There were two other "JC" 's who worked at Land Management at that time, James Cruz in Planning Division, (which never is involved in the map approval process), and Joe Cruz, who, as Land Administrator is involved in the map approval process. (Tr. IV p. 122).

Testimony indicated that whenever a lot number is requested, both the requesting surveyor and the Land Management employee assigning the lot number must appear on the lot-number log. (Tr. IV p. 17). When Lot Numbers 521 and 522, Merizo, were assigned, there is no record of who asked for or who gave the lot numbers. (Tr. IV p. 17). Anderson testified that he obtained the new lot numbers for Umatac and Merizo by meeting in person with Joe Cruz, who picked up the phone, asked for new lot numbers, and then gave them to Anderson. (Tr. VIII p. 78-80). There was also testimony that Joe Cruz' sister, an employee of the Land Registry Division, gave Thomas Anderson the lot numbers on Anderson's verbal request. (Tr. VI p. 111).

Having secured a map to the Umatac lots, Gill and Anderson then proceeded to their most ambitious project, the Merizo land.

Merizo

Gill became acquainted with a former lawyer by the name of Yokozeki who represented Japanese corporate interests. Yokozeki testified that some Japanese clients were looking for land on Guam suitable for a golf course, and that Yokozeki and Gill were trying to

find land for them. (Tr. VII p. 33) The suitability depended on the terrain and the proximity of water. (Tr. VII p. 33).

Meanwhile, Gill had asked Anderson if there was any other property "on this kind of a situation," that is, where title to the land was "no good." (Tr. IX p. 9). Anderson told Gill of Lots 521 & 522 Merizo, and Gill knew the lots were "no good." (Tr. VIII p. 82).

Anderson showed Gill a topographical map of Merizo Lots 521 & 522. Exhibits 63A, 63B and 63C. Anderson reported the conversation that occurred while viewing these maps as follows:

Anderson: This is the sketch (Exhibit 63A) that I took over to Francis Gill's office. I present it to him that he would like to increase the area that he wants to claim from what's showing on the tax roll area to be 32 and 33 hectares. He asked me to draw a line that would increase this size around here for his proposed boundary of place name [sic] Agua and Gumoje. After we sit down and discuss this, he said, "I need this area because I have about five clients who are interested in golf course area." *5 Gill then marked the area of government land on Exhibit 63A in yellow which he wished Anderson to include in a survey map.

Mr. Anderson: Yes, we started--I told him that the area your [sic] trying to claim is just beyond anybody's control. (Indicating). The portion here showing contains an area of 91 hectares. The other portion here containing an area of 41 hectares, and the other portion right here contains an area of 164 hectares.

Mr. Ramey: And what did he say?

Mr. Anderson: He asked me to do a survey work and I said, "I can't do this no ways; impossible to claim that much."

Mr. Ramey: Why? Why would it be impossible?

Mr. Anderson: The--based on the tax roll area from thirty two to--it increases so much.

* * *

Mr. Ramey: Okay. And what did he say?

Mr, Anderson: And he said, "Okay then let's come back and what about if we take the best land out of it."

Mr. Ramey: Take the what land?

Mr. Anderson: The best portion out of it, which in the topography map, the closer the line together it would show a .. like a cliff or a very steep hill. The lines that ... further apart shows the area

on ground that would be a nice slope or level area. (Tr. VIII p. 84-85). When Anderson refused to perform this survey for $75,000.00, Gill offered him $150,000.00 and Anderson agreed. (Tr. VIII p. 86).

Anderson mapped the property as directed by Gill and submitted the map to Land Management without prior checkprint approval. Lot 521 was subdivided into Lot 503-NEW and 521-1. The map for this lot was approved in September 1989. It showed an area of 192.05 hectares, or 1.8 million square meters. Exhibit 11A. The prior map of the exact same lot showed an area of 33 hectares. Exhibit 10A.

On that evidence, the jury returned verdicts of guilty on each count.

ARGUMENT ON APPEAL

Defendant Gill argued in the initial briefing that there was insufficient evidence. In Appellant's Opening brief, there was almost no discussion in support of the argument. The brief consisted mainly of extensive excerpts of the transcript relating to the following testimony: (a) Frank Castro's testimony that recording a map does not guarantee ownership of the property but is a step required in a land registration proceeding. (b) Frank Castro's testimony that there is no land registration decree stating that the claimed parcels of land were government of Guam land. (c) Frank Castro's testimony that the government of Guam does not know exactly how much land it owns. (d) Thomas Anderson's testimony that Gill himself never falsified any public records, and that the maps were not recorded as public instruments before Anderson manipulated them to encompass government land. (e) Joseph B. Cruz' testimony that he never met defendant Gill until the time of trial.

Because of the inadequacy of the initial briefing, the Court issued an Order that for each count of conviction, Appellant was to specify the grounds upon which the appeal is based. If the appeal was based on insufficiency of the evidence with respect to any count, Appellant's counsel was directed to discuss with specificity the deficiencies in the proof which requires reversal of each such count. If the appeal of any count of conviction was based on other grounds, those were to be stated with specificity, with full discussion and legal

authorities to support such ground. The Panel ordered, "each count should be stated and discussed separately."

*6 Accordingly, by this Court's Order of November 10, 1993, Defendant's pre-argument brief in this case was vacated and counsel for Appellant was directed to submit new briefing. .The government of Guam was permitted to file an Opposition to the Supplemental Brief.

Defendant filed his Supplemental Brief on November 29, 1993. The Territory of Guam filed their Opposition Brief on December 14, 1993. The November 10, 1993 Order stated that there would be no further oral argument. The case now stands submitted before the Appellate Panel on the Supplemental Briefs.

In his Supplemental Brief, the grounds for appeal appear to be: 1. Under Guam's "Theft of Property" statute, 9 G.C.A. § 43.30(b), one must be in a fiduciary relationship with the property owner in order to commit that offense. 2. "An attempt to commit an act which is not a crime cannot be the basis of a criminal conviction." 3. There is no evidence that Gill was empowered to dispose of land. 4. Gill did not falsify anything that was already a "record" and therefore cannot be guilty of falsifying public records. 5. There is no evidence that Gill falsified a record.

STANDARD OF REVIEW

When a criminal defendant asserts that there is insufficient evidence to sustain the conviction, this Court reviews the evidence in a light most favorable to the prosecution to ascertain whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. U.S. v. Necoechea, 986 F.2d 1273 (9th Cir.1993). The Ninth Circuit has noted that this is a highly deferential standard. U.S. v. Rubio- Villareal, 967 F.2d 294 (9th Cir. en banc 1992).

Appellant has also raised issues of statutory interpretation and impossibility. Issues of statutory construction are reviewed de novo. United States v. Martinez-Jiminez, 864 F.2d 664 (9th Cir.1989). Certain of the issues presented as "subsidiary issues" to his sufficiency of the evidence argument were presented in a motion to dismiss, Tr. I, II, IX p. 175, and as such receive de novo review. These are: the issue whether it was necessary for Gill to have been in a fiduciary capacity

to the property in question, whether he can be guilty of an Attempt if the underlying conduct could not have constituted a crime, and whether Gill acted in a fiduciary capacity with respect to the property.

The argument with respect to the Tampering with Public Records conviction, (that Appellant did not tamper with anything not already a record) does not appear in the record below. Therefore, this Court reviews under the plain error standard. United States v. Benny, 786 F.2d 1410 (9th Cir.1986), cert. den. 479 U.S. 1017 (1986).

DISCUSSION

I. Sufficiency of the Evidence

Gill was charged and convicted of (1) Conspiracy to Commit Theft, (2) Three counts of Attempted Theft (one for Piti, one for Umatac, one for Merizo) and (3) Conspiracy to Tamper with Public Records. [FN9] Appellant argues that there was insufficient evidence to sustain these convictions.

A. Conspiracy to Commit Theft of Immovable Property

*7 The elements of Conspiracy to Commit Theft of Immovable Property are, in § 13.30 and § 43.30(b) respectively, (1) a conspiracy (2) on the part of the defendant to transfer immovable property of another or any interest therein with intent to deprive him thereof. A conspiracy consists of an agreement with one or more persons that one of them will engage in conduct which constitutes a crime, with the intention of engaging in, promoting or assisting in the conduct which constitutes such crime, and that one perform an overt act in pursuance of the agreement. 9 G.C.A. § 13.30.

While drawing a map alone does not constitute the crime of theft, fabrication of such maps and the taking of significant steps to legitimize such fabrication, coupled with intent to take government land, constitute the crime Conspiracy to Commit Theft. There was evidence that he meant to hold out to the public that he owned these lands by recording the maps. (Tr. VII p. 125). He was aware of Anderson's "good contacts" at Land Management. (Tr. VII p. 70). He was aware and in one instance was surprised at how well Anderson's contacts performed. ("No shit, maps approved?" followed by laughter; Tr. VII p. 126). He took title to land whose title Anderson had told him was "no good" as the title had been manufactured by Anderson and his

"contacts." (Tr. VII & VIII passim). There is evidence that Gill intended to sell the Umatac and Merizo land that he was purchasing from Anderson to Japanese investors. (Tr. VII p. 33). There was a great deal of evidence that Gill exercised ownership rights over land he knew was not his, i.e.; subdividing the land. Exhibits 4A, 5A, 6A, 7A and 8. There was evidence of a conspiracy between he and Anderson to steal government land. (Tr. VII pp. 119, 126; Tr. VIII pp. 84- 85).

Intent can be inferred, and government's counsel is correct that otherwise innocent acts, when viewed in context, can justify a jury's determination of guilt. U.S. v. Calabrese, 825 F.2d 1342, 1348 (9th Cir.1987). Evidence in this case revealed that Anderson and Gill agreed to include government land in their maps, and that they did so with the intention of registering the land and selling it. The evidence of recordation of the maps, as required by Guam's land registration laws, satisfies the overt element requirement of conspiracy. Accordingly, there was sufficient evidence to sustain that conviction.

B. Attempted Theft of Immovable Property

The elements of Attempted Theft of Immovable Property, found in § 13.10 and § 43.30 respectively, are (1) an attempt (2) on the part of the defendant to transfer immovable property of another or any interest therein with intent to deprive him thereof. An Attempt under Guam law is defined as when, with intent to engage in conduct which would constitute a crime were the circumstances as he believes them to be, one performs an act which constitutes a substantial step toward commission of the crime. Although the record is clear that the transfer never occurred, that is, that the Land Registration proceeding was never completed, there was sufficient evidence of the attempt. Among the many acts which would constitute a substantial step toward the completion of theft of immovable property, one of the most obvious was the recordation of maps as required by the Land Registration Act, § 1157.4, § 157.5. With respect to the Piti lot, the evidence shows that a map was recorded as document number 414584 showing Gill's lot to be 3 hectares (instead of 1.3 hectares). With respect to the Umatac lot, a map of Lot 154A showing the size of the lot to be 10 hectares (instead of 3 hectares) was recorded at Land Management as document number 417952. Gill's map showing Lot 503NEW Merizo to consist of 182.05 hectares (instead of 32 and 33 hectares) was recorded at Land

Management as document number 424063. Each recordation constituted a substantial step toward each crime which, if completed by a Land Registration proceeding, would have constituted the crime of theft of immovable property.

C. Government Ownership of the Land as an Element of the Crime of Theft of the Immovable Property of Another.

*8 One of the grounds for reversal argued by Appellant's counsel is that the government did not prove that the land obtained through the false maps was indeed government land. The Panel notes that the conviction is for theft of the immovable land "of another," and therefore, the government would have to prove that defendant Gill did not own the land in order to prove the elements of § 43.30(b). [FN10]

Appellant's argument fails for the primary reason that the government indeed presented evidence that the land in question was government land. The government elicited testimony from Frank Castro, Director of Land Management, that the land in question was government land. (Tr. III pp. 18-20). The Director of Land Management based his conclusion on the fact that the land in question in this case was transferred to the government of Guam by the United States. (Tr. III pp. 16-17) The government also presented testimony of Department of Land Management worker Jimmy Camacho that the land being claimed was government land. (Tr. IV p. 114). While the evidence that it was government land was not supported by the document creating title in the government of Guam, there was nonetheless adequate and compelling evidence that it certainly did not belong to appellant and that the land was government land. And, this evidence was never contradicted.

As to defendant's contention that Castro later testified that the government of Guam was uncertain as to how much land they own, the issue of whether the land belonged to the government was a fact issue. As such, it was up to the trier of fact to decide whether the government proved that it was government land. Because Castro testified that the land was government land, there is a factual basis for the jury's determination that is was government land. We decline to disturb the finding of the jury.

Further, it is clear from the record that Appellant knew that the land he sought was government land, because he knew the size of his own land before the Anderson maps were begun. (Tr. VII pp. 112-13; Tr. VIII pp. 26-32; pp. 82- 83). The record is replete with evidence that the purpose of the scheme was to obtain land which he did not own.

This conclusion is supported by Guam law. The Panel takes judicial notice of Title 21 Guam Code Annotated § 1202, where it is provided that all land not owned by another owner belongs to the government of Guam: Government Property. The government of Guam is the owner of all land below tidewater, and below ordinary high-water mark, bordering on tidewater within Guam; of all land below the water of a navigable lake or stream; of all property lawfully appropriated to its own use; of all property dedicated to the government; and of all property of which there is no other owner.

D. Conspiracy to Tamper with a Writing or Record

A conviction for Conspiracy to Tamper with Public Records requires that the prosecution prove (1) a conspiracy (2) on the part of the defendant to falsify, destroy, remove or conceal, (3) knowing that he has no privilege to do so, (4) any writing or record, (5) with intent to deceive or injure anyone or to conceal any wrongdoing. The evidence established that there was an agreement between Anderson and Gill to falsify maps. Once falsified, the maps were recorded at Land Management, thus becoming public records. Anderson and Gill knew that the land being claimed by them in the maps was public land and that they had no right to claim the land as their private land in a later land registration proceeding. There was sufficient evidence to sustain the conviction for Conspiracy to Tamper with Records.

II. Issues of Statutory Interpretation

A. Statutory Interpretation of § 43.30

*9 The first issue raised in Appellant's Supplemental Brief is whether one can be found guilty of theft of immovable property of another without having first been in a fiduciary capacity to that property. This argument does not compel reversal. Neither 9 G.C.A. § 43.30(b) nor the Model Penal Code section from which § 43.30 was derived contain the limitation proposed by counsel. The comments to MPC § 223.2 [FN11] confirm that that section is designed to impose

criminal liability regardless of the relationship between the accused and the land, though certain exceptions are noted in that comment which do not apply in this case. There is simply no requirement in the law that the person charged with the crime must stand in a fiduciary relationship to the property.

Since empowerment to dispose of the land is not an element of the crime, lack of such evidence is not relevant.

B. An Attempt to Commit an Act which is not a Crime

The second argument posited by Appellant is that one cannot be found guilty of attempt if the completed conduct would not constitute a crime. In the Supplemental Brief, Appellant offers only excerpts from the case of Commonwealth v. Henley, 474 A.2d 1115 (Pa.1985), the same legal authority argued to the trial court, stating that if it is legally impossible to commit the crime, there cannot be criminal culpability. The Henley case cites the example where the fisherman believes that he is fishing illegally because he has no license, while in fact, no license is required on the lake on which the fisherman is fishing.

The Panel rejects this argument because the act, if completed, would have been a crime, as is the attempt. The Guam Legislature defined Theft of Immovable Property to be a crime when it adopted this section of the Model Penal Code in 1978.

C. Whether there is a requirement that the writing tampered with must have been a "record."

The next issue is whether Gill falsified a "record" because the maps were not yet public records when they were created. This argument was alluded to in the original brief, in Anderson's quoted testimony that Gill himself never touched the maps, and that the maps were not public records when they were being produced.

We again find Appellee's argument persuasive that the language of the statute imposes criminal culpability for falsifying a "writing or record." 9 G.C.A. ss 46.25 [emphasis added]. Despite the title of the statute, there is no requirement in the statute that the writing be a matter of public record before the falsifying is accomplished. The falsification is in the making of the maps.

Therefore, Appellant's contention that "there is no evidence that Gill conspired to falsify anything that was already a record," is

irrelevant to the analysis because the statute does not require that the falsified document only be a record or first be recorded. There was a statutory basis for the conviction, and sufficient evidence to support it.

*10 The convictions are AFFIRMED.

UNPINGCO, Judge, concurring.

To the extent that the argument presented also supports the contention that it was impossible to complete the crime, whether legally or factually, I further note that impossibility, whether legal or factual [FN12], is not available as a defense to Attempt under Guam law. The Guam Criminal and Correctional Code, 9 G.C.A. § 13.15, provides: Same [Attempt]: Impossibility No Defense. In a prosecution for an attempt, it is no defense that it was impossible to commit the crime. This code section was derived from Model Penal Code § 5.01, which focuses on the accused's state of mind as he believed the circumstances to be. **United States v. Allen,** 27 M.J. 234 (C.M.A.1988). Therefore, I therefore reject any corollary argument that there it was impossible to complete the crime, as Guam law, like the M.P.C., is designed to impose culpability for criminal intent.

FN1. The Honorable Edward Rafeedie, United States District Judge for the Central District of California, sitting by designation.

FN2. The Honorable Alex R. Munson, United States District Judge for the District of the Northern Mariana Islands, sitting by designation.

FN3. A hectare is equal to 2.471 acres.

FN4. The Reporter's Transcript will be designated herein by the notation "Tr." followed by the volume of Reporter's Transcript in which the reference is contained, followed by the page number.

FN5. A "checkprint" is a paper copy of the original Mylar draft map that is submitted to Land Management before the Mylar map is submitted. Surveyors submit this so that Land Management can mark the corrections that need to be made and the surveyor can modify the

map to Land Management's specifications before the original is submitted. (Tr. III Part Two p. 111).

FN6. There was testimony that Anderson and Joe Cruz had frequent contact as cousins, and that Anderson had lent him up to $15,000.00 to pay his debts, and that Cruz paid him back only a couple of hundred dollars of that sum. (Tr. VII p. 138).

FN7. An escaped assessment is provided for in the Guam Government Code § 19319: Property not previously assessed. If any property has escaped assessment in one or more prior years and is owned or claimed by the same person who claimed it or owned it during such prior year or years, the assessor shall assess the property at its value on the first Monday in March of every such year. Property which has previously escaped assessment shall be treated as property regularly assessed on the roll on which it is entered, but the entry of the assessment shall be followed with "escaped assessment for year _____."

FN8. The Panel takes judicial notice of the fact that Land Registration is not the only method by which one acquires secure title to real property on Guam. Guam's Land Registration law was borrowed from the California Civil Code in 1953. California has since eliminated its land registration law, and title in that state is normally secured by title insurance, as in any other state without the land registration system. In Guam, the two systems exist side by side, with some parcels registered while much real estate remains un-registered, its owners protected by the security of title insurance. Nonetheless, one can assert title with a valid deed in the chain of title. If the dimensions of the lot as shown in the deed are reflected in a map, this strengthens one's claim to title to the lot. Therefore, a completed land registration proceeding is not a prerequisite to asserting ownership in a quiet title action. However, once adjudicated in a land registration proceeding, one's registered title can only be set aside upon a showing of fraud.

FN9. The statutes under which Gill was charged were: 9 G.C.A. § 13.30 "Conspiracy: Definition"; 9 G.C.A. § 13.35, "Same:

Multiple Criminal Objectives"; 9 G.C.A. § 13.40, "Same: Scope"; 9 G.C.A. § 13.60, "Attempt, Solicitation, Conspiracy: Degree of Offense Stated"; 9 G.C.A. § 43.20(a), "Theft; Defined and Punishment Classified"; 9 G.C.A. § 43.30(b), "Theft of Property; Defined"; and 9 G.C.A. § 46.25, "Tampering with Public Records to Deceive or Conceal; Defined and Punished."

FN10. § 43.30. Theft of Property Defined.

* * *

(b) A person is guilty of theft if he unlawfully transfers immovable property of another or any interest therein with intent to deprive him thereof.

FN11. The Commentary notes, The inclusion of real estate within the definition of "property" also has the effect of extending the theft provisions to situations where the actor secures title or other interest in real property by deception or threat.

* * *

[I]t seems clear that criminal liability for theft is appropriate in cases where a person seeks to benefit himself or another through the illegitimate transfer of interests in real property. There is little to distinguish such cases from any other attempt to secure economic benefit at the expense of another. American Law Institute Model Penal Code Commentary, p. 167-173.

FN12. Eg.; a defendant is convicted of rape of a person who the defendant did not know was dead at the time of the rape, thus creating a factual impossibility, as in United States v. Thomas, 32 C.M.R. 278, 1962 WL 4490 (C.M.A.)). This is distinct from the situation described in Henley where there was no legal requirement for a fishing license, thus creating a legal impossibility for the crime to be completed. Both are examples of impossibility, because the completed conduct would have been criminal if the legal or factual impossibility had not existed.

CERTIFICATE OF SERVICE

I, Charles H. Troutman III, a member of the Bar of the Supreme Court of the United States and counsel of record for the Territory of Guam, Respondent herein, hereby certify that on March 28, 1996, pursuant to Rule 29, Rules of the Supreme Court, I served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on the other party herein, as follows:

On Francis L. Gill, Petitioner herein, by depositing such copies in the United States Post Office or mail box, Agana, Guam, with first class postage prepaid, properly addressed to the post office address of Jerry E. Hogan. The above-named Petitioner's counsel of record, at HOGAN & LINK, P.C., 104 Reflection Center, 222 Chalan Santo Papa, Agana, Guam 96910.

All parties required to be served have been served.

Dated: March 28, 1996.

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